JUDICIAL RESPONSES TO LONG-TERM SOCIETAL DECLINE

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INTRODUCTION

In order to make a modest contribution to legal scholarship, one can either write definitively on a subject of limited importance or sketchily on a subject of arguably greater importance. This Article falls easily within the latter category. Its subject is nothing less than the judicial system's potential for response to perceived or actual manifestations of broad long-term societal decline. The Article discusses theories of societal decadence in general terms, and then considers examples involving judicial responses to obscene and offensive speech, criminal behavior, and the rights of undocumented aliens.

For the sake of this Article's manageability, certain issues are avoided or treated as uncontroversially as possible. The Article, for example, remains as neutral as possible on rival conceptions of what societal decline involves or is caused by. It also takes no position on whether our own society can be fairly described as being at some stage in the course of overall long term decline, however one could conceive such a state of affairs. This is for several reasons. First, even once a common conception of societal decline or its more lurid, heavily freighted synonym "decadence" is arrived at, the problem of persuading an audience that the concept is applicable to a given society is substantial. One does not convince a skeptic of the decadence of a society by the conventional means of advancing masses of evidence of which the skeptic is not aware. One's view of matters such as broad decadence or vitality is not reinforced or undermined in the same way one changes one's mind about a narrow experimental hypothesis, or the probable guilt of a particular criminal defendant. It is more a matter of changing the way one looks at familiar things.

Equally important, pronouncing one's own society decadent—especially in the early, less unequivocal stages of decline—requires having better perspective than those within that society. Societal decline in the senses ex-

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plored by this Article is a long term phenomenon,[1] an uneven process of apparent revival and recovery phases alternating with ultimately more telling periods of deterioration.[2] Knowing our own society's location in the process is thus rather a tall order.[3] Of course, this immediately suggests one reason why even courts that feel themselves bound to uphold and maintain values enunciated or adopted two centuries before[4] rarely feel themselves in a position to identify long-term societal decline, or to contribute to any of the wide variety of possible responses to such decline. No judge, at any point, can reasonably feel certain that she is in fact confronted with any such phenomenon of genuine decline in the context of any pending judicial case.

This Article cannot avoid controversy entirely. Some may argue that the concept of long-term societal decline or, even worse, the concept of decadence lacks any useful, unequivocal substance. It is fair to say that one encounters vagueness and ambiguity of reference when surveying these concepts' use.[5] It is probably an overstatement, though, to suggest that the concept of decadence, even when used with rigor and caution, is unavoidably little more than an arbitrarily applied pejorative label, virtually empty of content.[6] The same charges could be leveled at other concepts that we do not propose to dispense with, such as the concept of political freedom.[7]

While the concept of decadence has frequently been used inadvisedly, the concept itself seems redeemable and potentially useful.[8] Decadence can be a name, or a sensible evaluation, of phenomena that seem quite real. Use of the term is supported by analogy and by common sense. It has been said, for example, that "[t]hinking of a family as maintaining a continuous existence over time, one can hardly help distinguishing the good stages of energy and prosperity from the bad ones of poverty and decay—to which, without undue strain, the adjective 'decadent' may get attached."[9] Similarly, "[w]hat is true of families may be equally true of cities and states; after a period of prosperity, without succumbing to any obvious *force majeure*, they may decline into weakness and ineffectuality."[10]

Without adopting such an analysis in all its particulars as crisply definitive of decadence, the family analogy seems recognizable and generally meaningful. It is also possible to validate the concept of decadence indirectly, through the recognizability of its opposite.[11] A given society may be

1. *See* R. ADAMS, DECADENT SOCIETIES 13 (1983); White, *On Properties and Decadence in Society*, 87 ETHICS 352, 359 (1977).
2. *See* A. TOYNBEE, CIVILIZATION ON TRIAL 13 (1948).
3. *See* R. ADAMS, *supra* note 1, at 13.
4. *See, e.g.*, Judge Bork's opinion in Ollman v. Evans, 750 F.2d 970, 993, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).
5. *See* C. JOAD, DECADENCE: A PHILOSOPHICAL INQUIRY 55 (1948); Molnar, *On Decadence and Decline*, 21 MODERN AGE 395, 397 (1977); Winthrop, *Variety of Meaning in the Concept of Decadence*, 31 PHIL. & PHENOM. RES. 510, 510 (1971).
6. For a claim along these lines, see R. GILMAN, DECADENCE: THE STRANGE LIFE OF AN EPITHET 14, 16, 21, 40, 153-54, 160, 162 (1979).
7. *See, e.g.*, I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969); Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOCIETY 167 (1956).
8. *See* R. ADAMS, *supra* note 1, at 2.
9. *Id.* at 2-3.
10. *Id.* at 4.
11. *See* C. JOAD, *supra* note 5, at 56.

characterized as vigorous, or vital; robust, fertile, healthy, exuberant. If the latter judgments are not completely arbitrary, and they seem not to be, neither need be their opposites, for which we might reserve the term 'decadent.'

Before surveying some of the most plausible, mainstream accounts of what decadence involves, certain preliminary points should be clarified. First, the concept of decadence, if it is otherwise coherent, can be applied to societies as a whole, and not merely to institutions such as the arts.[12] Similarly, the concept need not be applied exclusively to matters of personal or social morality.[13] This is so despite the fact that the concept of decadence undeniably has pejorative connotations.[14]

Despite the concept's negative connotations, it cannot be assumed that a decadent society is one without value or without accomplishments. An immoral society may be barbaric, rather than decadent—a cartoonlike image of the ancient Vikings may serve as an illustration[15]—and a decadent society may be preferable to live in, or at least less disagreeable than a non-decadent society bent on conquest at great sacrifice.[16] More specifically, a declining society may be more "open" generally, and there is no reason to rule out the possibility of at least certain kinds of intellectual progress in a society in general decline, at least in its initial stages. It has been suggested, for example, that a high degree of scientific achievement may be compatible with overall cultural decline.[17]

This Article also takes no position on the issues of the alleged inevitability of societal decline or the aptness of biological analogies in reflecting upon societal decline. Some writers are less than sanguine about the prospects for the regeneration of a decadent society;[18] others see no reason to assume the irreversibility of general decline.[19] It is also possible to reject a crude biological or life-cycle analogy, in which societies are initially "young," become "mature," and eventually "die," while not resolving the issue of the alleged

12. *See* Winthrop, *supra* note 5, at 510.

13. *See* White, *supra* note 1, at 356-57.

14. *See* Winthrop, *supra* note 5, at 510.

15. *See* White, *supra* note 1, at 357-58.

16. *See* C. JOAD, *supra* note 5, at 71; White, *supra* note 1, at 358. Professor White goes on to contend that not all decadent societies are inert or passive. *Id.*

17. *See* Dawson, *Progress and Decay in Ancient and Modern Civilization*, 16 SOC. REV. 1, 6 (1924). Richard Gilman maintains that every decline is also and simultaneously a rise and an advance, every waning a renewal. *See* R. GILMAN, *supra* note 6, at 162. This may be so in some loose sense, but the rise of an illiterate invading tribe may seem not to fully compensate for the overall eclipse of a once flourishing society now indifferent to its self-defense or to its own august cultural traditions, at least from the standpoint of the society invaded, even if overall decline at last brings wisdom. *Cf.* G. HEGEL, PHILOSOPHY OF RIGHT 13 (T.M. Knox trans. 1967) ("The owl of Minerva spreads its wings only with the falling of the dusk."), suggesting that only when a society has "grown old" and fallen into decline does philosophy reach its culmination of insight.

18. *See, e.g.*, O. SPENGLER, THE DECLINE OF THE WEST 30-31 (A. Helps ed. 1965); Campbell, *Oswald Spengler: The Approaching Death of Western Civilization*, 8 FUTURES 438, 443 (1976). David Hume was able to conclude that "when the arts and sciences come to perfection in any state, from that moment they naturally, or rather necessarily, decline and seldom or never revive in that nation where they formerly flourished." D. HUME'S POLITICAL ESSAYS 120 (C. Hendel ed. 1953).

19. *See, e.g.*, R. ADAMS, *supra* note 1, at 8; W. DURANT & A. DURANT, THE LESSONS OF HISTORY 91-92 (1968); R. GILMAN, *supra* note 6, at 67, 162; Dawson, *supra* note 17, at 11; White, *supra* note 1, at 359.

inevitability of decline.[20] Of course, it would be surprising if most judges assumed the inevitability of decline of their own society, at least in the harshly fatalistic sense that they saw no way collectively to even modestly contribute to any sort of rational response by the society to its own perceived decline. If this is for no other reason, it is because judges take an oath to protect and preserve constitutionally established values.

While it may be true that most writers normatively using the concept of decadence "do so conservatively, advocating explicitly or implicitly a return to norms which are rapidly disappearing from the cultures in which they find themselves,"[21] this is of course not our focus. This Article aims simply at a description and explanation of the general judicial non-responsiveness to long-term societal decline, despite the judicial commitment to values and standards adopted centuries earlier. One explanation, suggested above, is that even among judges of appropriate temperament and training, taking account of perceived long-term societal decline hardly seems appropriate in any particular case. Considerations of alleged broad long-term societal decline stretch even the expansive category of "legislative facts"[22] or "policy" considerations.

More crucially, though, the whole enterprise of precedent-based common law judging is by its nature inhospitable to a judge's considering a phenomenon like long-term societal decline. The primary judicial focus must in each litigated case be on the marginal difference between the case at bar and one or more arguably similar prior cases.[23] Societal decline we have taken to be a gradual, uneven, long-term phenomenon. The presumably relevant prior cases cannot be supposed to have introduced considerations of decadence into their reasoning. The case now at bar is presumably only marginally different in its facts from one or more of those prior cases. Because our society is by assumption only slightly different from the way it was at the time of the earlier cases, i.e., only slightly more decadent, the common law decisionmaking process leaves judges with no natural or obviously legitimate point at which to first introduce, let alone make controlling, any considerations of long-term societal decline.

To illustrate this, an analogy can be drawn to grains of sand and a heap of sand. Judges might agree that if one is confronted with a heap of sand, or with long-term societal decline, one may legitimately take that into account, all else equal. But a few isolated phenomena do not constitute overall long-term societal decline, just as two or three grains of sand do not constitute a heap of sand. The problem, of course, is that if N grains of sand are not a heap, neither are N+1 grains. And if what has developed up to a particular

20. Pitrim Sorokin rejected the uniform applicability of the life-cycle analogy to societies, while still believing that our current "sensate" cultural phase must inevitably exhaust its possibilities. *See* P. SOROKIN, THE CRISIS OF OUR AGE 23-24, 28 (1941).

21. Winthrop, *supra* note 5, at 526.

22. *See generally* Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (defining legislative facts); Davis, *"There Is A Book Out. . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) (analyzing judicial decisions influenced by legislative facts); Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988).

23. *See generally* E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

time has not been thought substantial enough to be judicially cognizable as long-term societal decline, neither, presumably, will what has happened up to that point, along with the most recent events, particularly given the gradualness and equivocality of historical trends.

SOME ATTEMPTS AT DEFINING LONG-TERM SOCIETAL DECLINE

Some portion of the explanation for judicial non-responsiveness to long-term societal decline may also be laid at the door of the contrasts, if not inconsistencies, among different theories of what the courts should look for when they are looking for decadence. At a minimum, one might commend judicial attention to indicators such as an overall long term decline in economic growth rates,[24] international competitiveness, or in ranking among developed nations in economic product per capita, as well as savings rates versus current consumption and collective educational achievement. However difficult it is to measure and compare, for example, savings rates across time and cultures, such an inquiry is at least less purely judgmental than other less quantitative indicia of decline.

Less narrowly quantitative approaches to long-term societal decline do command support, however, in part because they seem richer and more fully descriptive. Professor Joad, for example, provisionally defines decadence for his purposes as "the valuing of experience for its own sake, irrespective of the quality of the experience, the object of the experience, that upon which the experience is, as it were, directed being left out of account."[25] Thus, in a decadent era, "[t]he success of our lives will . . . be judged not by the degree to which they realize an end, achieve a goal, fulfil a purpose or conform to a standard which we have recognized as authoritative, but by the extent to which they contrive to embody a series of significant experiences."[26] Professor Joad therefore maintains that decadence tends to be associated with "(1) Scepticism in belief; (2) Epicurianism and Hedonism in conduct; (3) Subjectivism in thought, art and morals."[27]

Somewhat differently, Pitrim Sorokin cited four elements as symptomatic of the decline of any socio-cultural system. These elements include heightened irreconcilable self-contradictions within the society,[28] formlessness, "a progressive exhaustion of its creativeness in the field of great and perennial values," and what Sorokin refers to as "quantitative colossalism,"

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24. *See generally* M. OLSON, THE RISE AND DECLINE OF NATIONS (1982); Brittan, *How British Is the British Sickness*, 21 J.L. & ECON. 245 (1978).

25. C. JOAD, *supra* note 5, at 54.

26. *Id.* at 101.

27. *Id.* at 100. One might of course compare Joad's emphasis on the "preoccupation with the self and its experiences" in decadent societies, *id.* at 117, with C. LASCH, THE CULTURE OF NARCISSISM (1979).

28. P. SOROKIN, *supra* note 20, at 241. *Cf.* D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 7, 248-49 (1976) (noting "the end of the bourgeois idea" in an era of resistance to curbs on acquisitiveness, increased popular demands for government "entitlements," and an individualist ethos in tension with necessary social responsibilities and social sacrifices). *See also* J. LINZ, THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, & REEQUILIBRATION 52-53 (1978) (elaborating Linz's conception of "unsolvable" problems, in the form of goals that the government can neither renounce nor attain).

defined as "mere size and quantity at the cost of quality."[29] Sorokin was of the view that our "sensate" culture, more subjectively, "appears to have lost its self-confidence."[30]

Relatedly, decadence has been associated with a lack of "an animating vision of an ideal state of affairs"[31] and with major social institutions taking on a merely instrumental value, leading to a sense of the social system as "meaningless, directionless, and self-destructive."[32] A bit more formally, it has been suggested that " 'decadence' may be used as shorthand for the condition of a society incapable of transcending difficulties that, years before, it would have shrugged off as routine."[33] Another similarly formal approach emphasizes the decadent society's arrival, after a long-term gradual change "for the worse," at a condition in which the society persists in a tendency "to lack all strong commitment to anything other than the worthless or near worthless."[34] Of course, the decadent society itself will predictably be impatient with such an approach, arguing in response that it fails to recognize, in an appropriately relativistic, subjectivist manner, that what is worthless, or vacuous, or trivial to one person may not be so to another. Other typical, if less essential or invariant, qualities of a decadent society may include "an unwillingness to fight for survival, a lack of self-discipline and social cohesion, [and] a very high tolerance of incompatible standards and codes of behavior."[35]

RECURRING THEMES IN THE LITERATURE ON LONG-TERM SOCIETAL DECLINE

Several phenomena are frequently cited as indicators, if not actual causes, of long-term societal decline. These phenomena range from the prosaic and relatively narrow in scope to the lurid and expansive. Among the former, one may find such elements as loss of foreign markets, excessive taxation, excessive concentration in the distribution of wealth, and concentration of poverty in the great cities.[36] Among the widely cited broader concomitants of long-term societal decline is what might be called an impairment of elite functioning.[37] It is of course possible to argue that any such perspective is "elitist" in a normatively bad sense, or that the whole conception is irrelevant in modern societies that subscribe at least nominally to equality of opportunity and status among citizens. Nevertheless, the pos-

29. P. SOROKIN, *supra* note 20, at 241.

30. *Id.* at 252.

31. L. HAWORTH, DECADENCE AND OBJECTIVITY 3 (1977).

32. *Id.* at 4-6.

33. R. ADAMS, *supra* note 1, at 5. Arguably of at least equal importance is the condition in which a society cannot solve a persisting, systematic problem which, though unsolvable also in an earlier day, would not have been generated or allowed to develop in an earlier, non-decadent society.

34. White, *supra* note 1, at 355-56. "Worthless" here is meant to include not only the affirmatively evil, but the merely vacuous or trivial as well, and White's definition should not imply that the decadent society is strongly committed to anything at all, including the worthless.

35. *Id.* at 354. Remarkably high tolerance levels for all sorts of behavior is of course another respect in which a decadent society may seem admirable and healthy.

36. W. Durant & A. Durant, *supra* note 19, at 92.

37. *See, e.g., id.*; A. TOYNBEE, *supra* note 2, at 13; Molnar, *supra* note 5, at 401-02.

sibility of a decline in elite functioning remains of contemporary concern,[38] and is often thought to lead to undesirable consequences, such as a combination of both oppressiveness and underenforcement of the law,[39] a public policy orientation toward short-term considerations,[40] and a rise in subjectivism,[41] hedonism, and irreverence for its own sake.[42] The loss of a sense of social hierarchy has even been blamed for an increase in a vague, unarticulated sense of ultimate meaninglessness.[43]

While there is no doubt reactionary excess to some of the rhetoric associated with these themes, to some extent each of the elements noted above can be plausibly associated with a process of overall long-term societal decline. The themes of increasing subjectivism, moral relativism, and skepticism are often taken to be closely associated with societal decay,[44] and it is thought that their prevalence within a society can change over time.[45] Despite the undeniable natural law influences on the framers of our Constitution,[46] there has been, at least in the twentieth century, a significant strain of ethical skepticism, relativism, and subjectivism within American jurisprudence.

Justice Oliver Wendell Holmes, Jr. is perhaps the clearest distinguished example in this regard. Holmes, who referred to morality as "a sort of higher politeness,"[47] wrote to Harold Laski:

> I often think of the way our side shrieked during the late war at various things done by the Germans such as the use of gas. We said gentlemen don't do such things—to which the Germans: "Who the hell are you? *We* do them." There was no superior tribunal to decide—so logically the Germans stood as we did.[48]

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38. *See, e.g.*, A. SOLZHENITSYN, A WORLD SPLIT APART 9-11 (1978) (detecting a decline in "courage" among Western political elites, despite occasional boldness in dealing with weaker governments); Molnar, *supra* note 5, at 405 (increasing elite or governmental disinclination to resist public opinion); E.D. HIRSCH, CULTURAL LITERACY 4-9 (1987) (noting declining educational achievement of the most talented students); A. BLOOM, THE CLOSING OF THE AMERICAN MIND 22 (1987) (noting that his strictures are based essentially on observation of an academic elite).

39. *See* Molnar, *supra* note 5, at 398.

40. *See* Buchanan, *The Samaritan's Dilemma*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 84 n.6 (E.S. Phelps ed. 1975). *See also* P. KENNEDY, THE RISE AND FALL OF GREAT POWERS 527 (1987), for a discussion of long term costs of public indebtedness.

41. *See* Molnar, *supra* note 5, at 402.

42. *See* id. at 401. It is not difficult to imagine how such processes could be self-exacerbating over time. As less is revered, presumably irreverence must over a long period of time become more extreme or more pervasive to produce much psychological effect.

43. *See* Dawson, *supra* note 17, at 8.

44. *See* C. JOAD, *supra* note 5, at 111:

> in regard to morals, one man's judgement about right or wrong is taken to be as good as another's, precisely because no object' is postulated in the shape of a moral order which, existing independently of ourselves and rooted in the nature of things, can serve as a standard by reference to which one mode of behavior can be judged morally superior to another . . .

See also Molnar, *supra* note 5, at 402-03; White, *supra* note 1, at 361 (viewing increasing subjectivism as perhaps a consequence, rather than a cause, of decadence).

45. Alexander Solzhenitsyn observes that "[t]wo hundred or even fifty years ago, it would have seemed quite impossible, in America, that an individual be granted boundless freedom with no purpose, simply for the satisfaction of his whims." A. SOLZHENITSYN, *supra* note 38, at 51.

46. *See, e.g.*, J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1965).

47. 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 837 (M. DeWolfe Howe ed. 1953) (letter to Laski of May 13, 1926).

48. *Id.* at 1238 (letter to Laski of April 18, 1930).

Holmes may have displayed some lurking ambivalence, toward a relativistic view, in suggesting to Laski that:

> If a man makes a great fortune by selling some patent medicine to the crowd, that shows that in those circumstances the crowd wants it—and I can see no justification in a government's undertaking to rectify social desires—except upon an aristocratic assumption that you know what is good for them better than they—(which no doubt you do).[49]

Such views are hardly idiosyncratic with Justice Holmes. More recently, Justice Blackmun observed that "[r]elativistic notions of right and wrong . . . have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal."[50]

Justice Blackmun is doubtless right in detecting strong subjectivist and relativistic tendencies in contemporary jurisprudence. Without adopting the labels of subjectivism or relativism, Professor Bruce Ackerman, for example, sets down as a basic principle of the legitimate exercise of legal authority that "[n]o reason is a good reason if it requires the power holder to assert . . . that his conception of the good is better than that asserted by any of his fellow citizens . . . ."[51] Even Chief Justice Rehnquist, not ordinarily thought of for his intellectual affinities with Professor Ackerman, has written that "[t]here is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa."[52] Of course, the basic Rehnquist "project" is nevertheless to retain the authoritative or morally binding quality of the Constitution. But there is some tension in the Rehnquist approach. Chief Justice Rehnquist views the Constitution, drafted and entered into long before the birth of any of us, and to which many citizens have not voluntarily consented in any active, familiar sense of the term, as nonetheless morally binding on us all. Rehnquist's view may ultimately depend at least in part on a judgment of his own conscience, a judgment that cannot necessarily be made rationally convincing to anyone who doubts it.[53]

A related theme often associated with long-term societal decline is that of the increasing secularization of major social institutions.[54] Professor Joad refers to this process as a possible mechanism of social decay: "When the

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49. 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 732 (M. DeWolfe Howe ed. 1953) (letter to Laski of July 23, 1925).

50. Parker v. Levy, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring).

51. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980). For a variety of critiques of Professor Ackerman's general theory, *see generally* the symposium in 93 ETHICS 328 (1983).

52. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976).

53. *Cf.* D. GAUTHIER, MORALS BY AGREEMENT (1986) (developing a subjectivist-relativist account); A. MACINTYRE, AFTER VIRTUE 6 (2d ed. 1984) ("There seems to be no rational way of securing moral agreement in our culture"); J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 15 (1977) ("There are no objective values"); B. WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 22-26 (1985) (discussing the difficulty of persuasively undermining the views of the ethical skeptic who wishes simply to consistently opt out of the use of all moral language); 63 MONIST 3 (1980) (the three Carus Lectures of William Frankena with accompanying replies).

54. *See* C. JOAD, *supra* note 5, at 100 ("The absence of strong, religious belief is a familiar characteristic of so-called decadent ages"); W. DURANT & A. DURANT, *supra* note 19, at 92-93 (describing a possible general decadence scenario involving increased secularization).

foundations of the Christian code in Christian belief were sapped, it was unlikely that the superstructure of morals which was raised upon them would indefinitely survive. Nor has it done so."[55] This rather severe analysis has more recently been at least partially echoed by Daniel Bell's observation of the "erosion of the Protestant ethic and the Puritan temper."[56] Of course, whether increasing secularization in fact contributes to long-term societal decline in the particular case of any individual society is hardly free from debate.[57]

Three additional, closely related themes recurring in discussions of social decline are those of an increase in hedonism or pleasure-orientation, a perceived general weakening in the exercise of self-control, self-discipline, and self-restraint, and an increasing tendency for societal decisionmaking to reflect a relatively short-term orientation. Of course, such phenomena, even if clarified conceptually, will pose monumental difficulties for precise measurement. However, we have no guarantees that the phenomena that really do attend long-term societal decline will be open to precise measurement. If they are not, we should think twice about ignoring them judicially merely because they cannot be easily quantified.

Professor Joad develops the hedonism thesis in the following terms: "in so far as we attempt to estimate the worth of experience, we shall do so by reference to a single standard, the degree of its pleasurableness."[58] A bit more subtlely, insofar as experience is valued "for its own sake, we shall tend to hold that the more intense and the more various the experience the better . . . ."[59] There is a resulting tendency toward a jading of the appetite, with dissatisfaction being avoided only by experiencing the novel and unfamiliar.[60]

It has similarly been suggested that, at least in the popular estimation, one characteristic of a decadent society is its loss of self-discipline.[61] In the modern era, it is often suggested, an ethic of self-expression has largely supplanted one of self-control,[62] and an imbalance has developed between the pursuit of individual rights and the obligations of citizenship.[63] Alexander Solzhenitsyn has observed in particular that the "legalistic" quality of many of our social relationships is by its nature inhospitable to self-restraint, sacri-

55. C. Joad, *supra* note 5, at 108.

56. D. BELL, *supra* note 28, at 55. Recall Max Weber's observations that the modern de-coupling of work from the highest spiritual and cultural values will result eventually in "[s]pecialists without spirit, sensualists without heart . . . ." M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 182 (1958).

57. *See* Bliese, *Christopher Dawson: His Interpretation of History*, 23 MODERN AGE 259, 260 (1979) (discussing Dawson's view that "a secular society will sooner or later disintegrate"). *But see generally* K. NEILSEN, ETHICS WITHOUT GOD (1973).

58. C. JOAD, *supra* note 5, at 117.

59. *Id.*

60. *See* Winthrop, *supra* note 5, at 518 (discussing Professor Joad's theory).

61. *See* White, *supra* note 1, at 357.

62. *See, e.g.*, Wilson, *The Rediscovery of Character: Private Virtue and Public Policy*, 81 PUB. INT. 3, 13 (1985).

63. *See* A. SOLZHENITSYN, *supra* note 38; Janowitz, *Observations on the Sociology of Citizenship: Obligations and Rights*, 59 SOCIAL FORCES 1 (1980). For further developments of this theme by Professor Janowitz, see M. JANOWITZ, THE RECONSTRUCTION OF PATRIOTISM: EDUCATION FOR CIVIC CONSCIOUSNESS (1985).

fice, and selfless risk.[64] This point is echoed by Professor James Q. Wilson, who notes that the American Republic is not structured so as to combat societal decay through means such as the inculcation of virtue or self-restraint.[65] Instead, our constitutional system emphasizes ingenious, if imperfect, institutional or structural restraints on anticipated selfish action.[66]

One possible recent manifestation of a long-term loss of social self-restraint may be the increasing trend toward intergenerational wealth transfer from future to current generations through inessential public borrowing. It has always been possible for current generations to enrich themselves at the expense of their successors through borrowing. Yet only recently have we indulged in this possibility on a large scale. While this is no doubt in part attributable to the rise of Keynesian macroeconomics, it may also be attributable to an erosion of the "Victorian" moral inhibition against embracing policies of this sort.[67]

This phenomenon may exemplify an increasing emphasis on short-term considerations on the part of both government and business and private citizens generally. Professor Wilson discusses the admittedly judgment-laden claim that people may discount the future "too heavily."[68] In this he follows the descriptive observations of writers such as the economist Joseph Schumpeter, who detected a shrinking of governmental and business time-horizons to emphasize short-term considerations.[69] Government policy may, in emphasizing the short term, reflect the influence of the general populace.[70]

This brief survey of some of the phenomena that are widely thought to attend or follow from, if not cause, social decline is largely integrated in Plato's famous idealized depiction of the decline and fall of democratic society. In Plato's account, the democratic state, having already declined from an oligarchical stage, and in the course of its logical, if not practically inevitable, descent into tyranny, bears certain recognizable characteristics. These include the society's freedom, frankness, variety, forgiving spirit, and delight in short-term consequences.[71]

Plato further depicts the democratic character as rejecting the suggestion that some pleasures are the result of satisfaction of good and noble

64. A. SOLZHENITSYN, *supra* note 38, at 17.

65. Wilson, *supra* note 62, at 14.

66. *See* THE FEDERALIST PAPERS Nos. 10 and 51 (C. Rossiter ed. 1961) (discussing the multiplication of diverse factions and the necessity of ambition being made to counteract ambition). *See also* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing the role of civic virtue republican thought among the founders).

67. *See* Wilson, *supra* note 62, at 10-11 (referring to the observations of Professor James Buchanan).

68. *Id.* at 5.

69. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 161 (3d ed. 1962). *See also* Buchanan, *supra* note 40, at 84 n.6.

70. *See* Winthrop, *supra* note 5, at 518-19; Buchanan, *supra* note 40, at 84 n.6. Friedrich Nietzsche, whose judgments about social decay admittedly tend toward the idiosyncratic, observed that "[d]isintegration characterizes this time, and thus uncertainty: nothing stands firmly on its feet or on a hard faith in itself; one lives for tomorrow, as the day after tomorrow is dubious." F. NIETZSCHE, THE WILL TO POWER 40 (W. Kaufmann ed. 1967).

71. PLATO, THE REPUBLIC, in 2 THE DIALOGUES OF PLATO 326-27 (B. Jowett trans. 1954). One notes again here the appealing quality of some aspects of societal decline.

desires, and others of evil desires, and as accepting the theory that all desires are on a par, and that "one is as good as another."[72] Self-discipline, for the democratic character, is simply another passing fancy, capriciously and fleetingly engaged in.[73] A primary motivation for the democratic character is the quest for immediately pleasurable experience.[74] As well, the extension of equality eventually begins to subvert any real sense of community in the democratic society: "the metic [i.e., resident alien] is equal with the citizen and the citizen with the metic, and the stranger is quite as good as either."[75] In this, Plato was no doubt influenced by his own surroundings. It has been argued, for example, that "[p]ermissiveness and easy escape from legal penalties were no doubt real signs of weakening community sense in fourth-century Athens . . . ."[76]

Plato, alone and in conjunction with the contemporary writers discussed above, provides a picture in theory of a society in long-term decline. But it is also possible to look to history for some assistance in envisioning long-term societal decline. For example, whether it is fair or accurate to do so,[77] the waning days of the Western Roman Empire are often thought of as the quintessence of historical decadence. No less a figure than Max Weber has argued, in the context of his discussion of the Roman decline, that "we can learn little or nothing for our contemporary social problems from ancient history."[78] But logic does not compel this skeptical conclusion that history is nothing more than a series of unprecedented discontinuities. It is reasonable instead to simply not lose sight of the undoubtedly numerous respects in which a contemporary decadent society, or our own society, must significantly differ from that of Rome in decline.[79]

Commonly cited among the alleged contributing factors to Roman decline is the excessive size, power, and arbitrariness of the bureaucratic Roman civil service.[80] By the late Roman Empire, the bureaucracy's red tape, inefficiency, and intransigence, as well as its corruption, had become increasingly common.[81] The sheer size of the bureaucracy required a heavy tax burden, despite periodic reform efforts,[82] and the burden was borne dispro-

72. *Id.* at 332.

73. *Id.*

74. *See* C. JOAD, *supra* note 5, at 102-03.

75. PLATO, *supra* note 71, at 334.

76. Skemp, *The Causes of Decadence in Plato's Republic*, 17 GOV'T & OPPOSITION 80, 86 (1982). For a depiction of Athenian democratic society in less decadent colors, see Pericles' funeral oration in THUCYDIDES, THE PELOPONNESIAN WAR 145-47 (R. Warner trans. 1954).

77. *See* R. GILMAN, *supra* note 6, at 65 (noting, but ultimately rejecting, our common mythic ascription of decadence to the late Roman Empire).

78. Weber, *The Social Causes of the Decay of Ancient Civilization*, 5 J. GEN. EDUC. 75, 76 (1950).

79. *See* R. ADAMS, *supra* note 1, at 123-24 (discussing a wide variety of respects in which our society differs in kind or degree from that of the declining Western Roman Empire).

80. *See, e.g.*, Loewe, *Decline and Fall in East and West*, 19 ARCHIVES EUR. SOC. 168, 177 (1978).

81. *See* Antonio, *The Contradiction of Domination and Production in Bureaucracy: The Contribution of Organizational Efficiency to the Decline of the Roman Empire*, 44 AM. SOC. REV. 895, 904 (1979); Jones, *The Social, Political, and Religious Changes During the Last Period of the Roman Empire*, in THE DECLINE OF EMPIRES 67, 69 (S. Eisenstadt ed. 1967).

82. *See* Jones, *supra* note 81, at 75.

portionately by small rather than large landowners.[83] Not surprisingly, the swelling of the bureaucracy was associated with endemic inflation.[84]

Among the other widely cited conditions attendant upon Roman decline are: the decline of public-spiritedness,[85] of the martial virtues, and of sacrifice for one's country;[86] a politics increasingly focusing on redistribution of wealth and self-interested bloc voting as opposed to sober debate of the common good;[87] a decreasing ratio of net economic producers to net economic consumers;[88] an army of insufficient strength in proportion to its assumed responsibilities;[89] and even a diminution in the clarity, vigor, and forcefulness of principle embodied in Roman statutory law.[90]

One other phenomenon worthy of comment bears on the matter of Roman citizenship. Rome was eventually forced, despite its original intentions, to grant Roman citizenship to all territorial inhabitants, with the exception of slaves.[91] The merits of this policy aside, the historical example of Rome suggests two reasons why long-term societal decline may go unchecked. First, social phenomena do not come pejoratively labeled as "decadent." An extension of the bequest of citizenship appears most obviously to be a progressive, liberal reform underpinned by the value of equality. The less obvious, or less immediate, consequence of extending citizenship through the political decisionmaking process was a "devaluation" or attenuation of Roman citizenship, a consequence which further impaired the sense of Roman community.

The second reason why long-term societal decline may go unchecked is that such equivocal measures as extension of citizenship may be perfectly rational from the standpoint of the beneficiaries of extended citizenship. Most political systems tend to take intensity of preference into account in some fashion or another, and it seems quite possible that a person who stood to become a Roman citizen would have gained far more in the way of benefits from becoming a citizen than he would have lost as a result of his own minimal contribution to the dilution of what it distinctively meant to be a Roman citizen. The potential citizen's interests may well lie in a broad grant of citizenship to those with whom he shares common interests. Those interests may also be largely shared by some fraction of those who have already attained citizenship status, and who thus may have greater political influence. Crucially, the potential citizen, and his allies, may have more to gain from extension of citizenship than will generally be lost individually by each of those who are already citizens, and who will doubtless be compensated at least in part by the greater availability of the distinctive talents of the new citizens. Extension of citizenship, in each particular instance, will tend to stimulate stronger intensity of preference and greater exertions among

83. *See* Antonio, *supra* note 81, at 907.
84. *See* Loewe, *supra* note 80, at 178.
85. *See* Jones, *supra* note 81, at 67.
86. *See* Molnar, *supra* note 5, at 399.
87. *See id.*
88. *See* Dawson, *supra* note 17, at 9; Jones, *supra* note 81, at 74-75.
89. *See* Loewe, *supra* note 80, at 178.
90. *See id.* at 176.
91. *See id.* at 173.

would-be citizens than among members of the latter group. Thus, long-term societal decline, in the form of the reduced meaningfulness of citizenship, is able to proceed because, among other reasons, it "arrives" only in the long term and is initially an abstraction, it may be tied to progressive reforms, and the logic of political decisionmaking itself may on occasion promote it.

THE JUDICIAL SYSTEM AND THE POSSIBILITY OF LONG-TERM SOCIETAL DECLINE

The contemporary judicial system's reactions to the phenomena associated above with long-term societal decline have been mixed. Discussed below are three judicial opinions chosen to illustrate the diversity of judicial reaction to such phenomena; the cases were chosen essentially at random from the range of cases in which courts made policy decisions bearing on phenomena that are often associated with societal decline. The first case, an admittedly extreme example, is the decision of the Oregon Supreme Court in *State v. Henry*,[92] in which the court broadly protected obscene expression under the Oregon Constitution. Such an opinion embraces and affirms the undeniably positive side of phenomena the obverse of which may be associated with long-term societal decline. In the second case selected, *United States v. Salerno*,[93] the Supreme Court upheld pretrial detention of criminal suspects based on predictions of their future dangerousness in an opinion that implicitly, but only implicitly, showed greater sensitivity to long-term historical trends and their constitutional implications. Finally, this Article briefly considers *Plyler v. Doe*[94] and related cases, in which, it is argued, the courts are swamped by the depth and complexity of the broad philosophical and long-term policy issues inherent in questions of the constitutional rights of undocumented aliens to state services as well as other issues involving immigration, state and federal sovereignty, and the nature of membership in the political community.

Decadence and Obscene or Offensive Expression

The Oregon Supreme Court case of *State v. Henry*[95] represents a logical extension of developing trends in the area of offensive, vulgar, or obscene[96] speech. The court in *Henry* held broadly that allegedly obscene speech is generally protected by the free speech provision of the Oregon Constitution.[97] Perhaps the essence of the Oregon Supreme Court's opinion is caught in the court's conclusion that:

> [A]lthough Oregon's pioneers brought with them a diversity of highly moral as well as irreverent views, we perceive that most members of

92. 302 Or. 510, 732 P.2d 9 (1987).
93. 107 S. Ct. 2095 (1987).
94. 457 U.S. 202 (1982).
95. 302 Or. 510, 732 P.2d 9 (1987).
96. Unless the context suggests otherwise, "obscene" herein is intended to refer to material that might be thought to fall within the general scope of the Court's test in cases such as Miller v. California, 413 U.S. 15 (1973), and is not intended to refer only to the legal conclusion that the material actually fails the *Miller* or other applicable obscenity test.
97. *Henry*, 302 Or. at 525, 732 P.2d at 17.

> the Constitutional Convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others.[98]

Of course, the aim of this paper is not to take issue with the decision in *Henry*. Instead, it is important to note how phenomena often associated with social decline can be converted to objects of pride through a combination of creative characterization and de facto ethical relativism. This creative characterization is the court's response to the nagging fear that pornography may be "out of control" in the sense of being more pervasive and extreme now than formerly,[99] with the pervasiveness and extremity of the materials exceeding what is thought desirable by most adults, or even by many consumers of pornography. Even the complete demise of any standards at all can be characterized as evidence of "robustness," of "non-prudishness," of "ruggedness,"[100] or as reflecting pluralism and diversity.

Unfortunately, if a society is in fact in the process of fragmenting, praising it as diverse, open, and pluralistic may not be sufficient to restore it to health. A society in which the depth and breadth of common values are decreasing may be in the process of losing collective confidence and declining, even while we celebrate the society's pluralism. There may be some self-delusion in deciding simply to choose the more favorable characterization. Certainly, our greatest liberal writers, such as John Stuart Mill, have emphasized the values of pluralism and diversity.[101] But not without limits. It has been rightly observed that "[n]either Mill nor others like him have ever argued for a society pluralist to its roots. Indeed, the liberty they plead for only makes sense within a society that strives after the highest ideals of the West; within a society, that is, committed to rational enquiry . . . ."[102]

Similarly, the Oregon Supreme Court in *Henry* at no point explicitly contrasts relativist with non-relativist views of the true nature of morality, finding the former convincing on the merits. Instead, the court in *Henry* seems to assume that the abolition of obscenity laws should follow from the observable fact that people's views of morality differ, together with the premise that rugged individualism characterizes Oregon's constitutional framers and is itself a desirable quality. It appears unwarranted, then, to permit "governmental imposition of some people's views of morality on the free expression of others."[103]

The Oregon Supreme Court's *de facto* ethical relativism is neither extreme nor unusual. Perhaps the most familiar kindred statement is that of Justice Harlan for the Court in *Cohen v. California*.[104] In the context of

98. *Id.* at 523, 732 P.2d at 16.

99. Even if we assume that the rugged Oregonians of 1857 were so diffident as to not presume to set any obscenity standards at all for later generations, it is difficult to imagine that they would find mass circulation of even non-obscene publications such as *Hustler* and *Penthouse* as anything short of inconceivable.

100. Henry, 302 Or. at 523, 732 P.2d at 16.

101. *See generally* J.S. MILL, ON LIBERTY (D. Spitz ed. 1975).

102. White, *supra* note 1, at 360-61.

103. *Henry*, 302 Or. at 523, 732 P.2d at 17.

104. 403 U.S. 15 (1971).

adjudicating the status of the "distasteful" anti-draft slogan emblazoned on Cohen's jacket, Justice Harlan declared that "it is . . . often true that one man's vulgarity is another's lyric."[105] Similarly, Justice Harlan concluded, "governmental officials cannot make principled distinctions in this area . . . ."[106] Justice Harlan apparently viewed the underlying issue as a matter of "taste and style."[107] Justice Harlan's language is in fact often cited in a more extreme version, without his qualification as to what is "often true," resulting in the flat relativism that "one man's vulgarity is another's lyric."[108] Echoes of Justice Harlan's approach can be heard in Justice Douglas' observation that "what may be trash to me may be prized by others"[109] and in the Court's more general formulation that "[w]hat seems to one to be trash may have for others fleeting or even enduring values."[110] At least one court, in an alleged indecent public language case, has explicitly interpreted the *Cohen* analysis as viewing "obscenity" as "subjective—a relative matter."[111]

As we have seen,[112] relativism and subjectivism are often thought to be associated with societal decadence. But if the courts make no such connection between relativism and decadence, their response to an increase over time in arguably offensive public language or to obscenity is likely to encourage or tacitly promote such phenomena. A court attuned to the possibility of decadence is likely to view a perceived historical increase in offensive language or obscenity with some concern. But to a relativist-minded court, not attuned to the possibility of decadence, an increase over time in arguably offensive public language or obscenity takes on a self-validating quality.

The Fifth Circuit, for example, in *Bazaar v. Fortune*[113] referred to the arguably objectionable language at issue as "no longer really that unusual,"[114] perceived a "trend"[115] toward its use, and observed, without endorsing the language at issue, that "things considered horribly 'indecent' a few years ago are quite commonplace today."[116] To a decadence theorist,

105. *Id.* at 25.

106. *Id. See also* Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L. L. REV. 1, 20 (1974) (*Cohen* as indicating Court's "inability to draw a conclusive line between offensive language and other language").

107. *Cohen*, 403 U.S. at 25.

108. *See, e.g.*, State v. Authelet, 120 R.I. 42, 54, 385 A.2d 642, 648 (1978).

109. United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).

110. Hannegan v. Esquire, Inc. 327 U.S. 146, 157-58 (1946), *quoted in* Pope v. Illinois, 107 S. Ct. 1918, 1927 (1987) (Stevens, J., dissenting). *See also* Fowler v. Board of Educ., 819 F.2d 657, 668-69 (6th Cir. 1987) (Merritt, J., dissenting) ("what one judge sees as 'gross and bizarre,' another may find . . . mild and not very 'sexually suggestive' ").

111. People v. Klein, 67 Mich. App. 556, 557, 242 N.W.2d 436, 437 (1976) (per curiam). *See also* Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 299 (distinction between "vulgarity" and "lyric" as "subjective" in nature).

112. *See supra* notes 44-53 and accompanying text.

113. 476 F.2d 570 (5th Cir. 1973), *aff'd en banc as modified*, 489 F.2d 225 (5th Cir.) (en banc), *cert. denied*, 416 U.S. 995 (1974).

114. *Id.* at 580.

115. *Id.*

116. *Id.*

this state of affairs might be cause for concern. To a relativist theorist, the same state of affairs shows most crucially the increasingly broad popularity, or at least acceptance, of the language at issue. For a relativist court, the step from popular acceptance to judicial acceptability is hardly noticeable.

It is possible to seek to allay the fears of the decadence theorist in this regard by assuming that the use of language predictably offensive to some of one's audience is simply to be expected to increase in an era of sustained political and social conflict.[117] But this does not seem a particularly convincing explanation for the more frequent use of intentionally offensive language. The language for which persons such as the defendant in *Cohen* have been prosecuted has been technically available throughout the course of the virtually unceasing political and social conflict endemic to American political history. Further, in view of the increased stakes, it is not obvious why an increase in political and social conflict should not tend to drive out intentionally or predictably offensive language in favor of more cogent or otherwise persuasive language. More importantly, though, it should not be assumed that the typical offensive language case at the appellate level is deeply imbued with political and social issues, at least in any direct sense. Most such cases are not.[118]

Instead, the more convincing explanation for the historical increase in offensive language, or of the use of particular profanities, as well as for cases such as *Henry*, may lie in the "erosion of the Protestant ethic and the Puritan temper,"[119] which were ordinarily thought of as "codes that emphasized work, sobriety, frugality, [and] sexual restraint. . . ."[120] The increasing doubts about the judicial imposition of such values may be simply one more respect in which "the typical bourgeoise is rapidly losing faith in his own creed."[121]

With the partial demise of traditional rigorous systems of public morals in these areas, the Supreme Court has naturally tended to minimize consideration of the most abstract, ephemeral kinds of alleged injuries. The Court has tended to exclude "claims of harms to 'sensibilities' as a justification for suppression of offensive language. It has recognized as a valid state interest only the prevention of violent reactive conduct and has been willing to assume the likelihood of such behavior only in the narrow case of fighting words."[122] If the courts are not particularly attuned to the possibility of gradual, long-term societal decline, they will quite naturally tend to focus on

117. *See* Rutzick, *supra* note 106, at 1.

118. A fairer sense of the nature of the reported cases can be derived from cases such as Wilson v. Attaway, 757 F.2d 1227 (11th Cir. 1985); Bovey v. City of Lafayette, 586 F. Supp. 1460 (N.D. Ind. 1984), *aff'd mem.*, 774 F.2d 1166 (7th Cir. 1985); People v. John V., 167 Cal. App. 3d 761, 213 Cal. Rptr. 503 (1985); Cavazos v. State, 455 N.E.2d 618 (Ind. Ct. App. 1983); State v. John W., 418 A.2d 1097 (Me. 1980); Commonwealth v. Mastrangelo, 489 Pa. 254, 414 A.2d 54, *appeal dismissed*, 449 U.S. 894 (1980); City of Seattle v. Camby, 104 Wash. 2d 49, 701 P.2d 499 (1985) (en banc).

119. D. BELL, *supra* note 28, at 55.

120. *Id.*

121. J. SCHUMPETER, *supra* note 69, at 161. For a statement of Justice Scalia's absence of faith in the availability of ascertainable standards in the area of obscenity, see Pope v. Illinois, 107 S. Ct. 1918, 1923 (1987) (Scalia, J., concurring).

122. Rutzick, *supra* note 106, at 27.

the risk of only the most tangible, immediate, concrete sorts of harms.[123] Even under the broadest analysis, if the courts see no risk of promoting societal decline, they will not pause to balance any risks of contribution to societal decline against even a very slight perceived risk legislative or judicial oppression.[124] If no tangible harm can be shown to befall the immediate parties, the courts are likely to feel that the only alternative grounds for failing to protect the challenged conduct must be some moral code that is not universally shared.[125]

But the possibility of gradual, long-term societal decline, or such matters as the gradual loss of a sense of community in particular,[126] is neither concrete, nor tangible, nor immediate, nor clear cut and unequivocal. One person's loss of community is another person's enhanced pluralism. Such sorts of alleged harms certainly do not fit within the kind of clear-and-present-danger analysis with which we are most comfortable in the general free speech area.[127] While it seems undeniable that there can be such a thing as a moral climate or moral environment,[128] however amorphous, and that such things can be culturally important, and can change arguably for the worse, such considerations may be too ineffable for a judiciary to manage. To the extent that our social life is organized "legalistically," the problems of offensive or obscene speech may not be soluble in the long run.[129]

Decadence, Criminality, and Preventive Detention

Each society unavoidably strikes some sort of balance between minimizing the pretrial confinement of accused persons and enhancing the public safety and community integrity. Where the society initially chooses to strike the balance is a matter largely of political philosophy. While an emphasis on the "liberty interests" of criminal suspects seems natural to us, at least some historical liberals have expressed misgivings on this score. The Enlightenment pillar Condorcet, for example, considered the primary and most important of the rights of man to be "[s]ecurity of the person, which includes the assurance that one will not be disturbed by any violence . . . ."[130] Condorcet's logic was in part that "the man who has never feared outrages against his person acquires a more elevated and compassionate soul; . . . the

123. *See* Farber, *supra* note 111, at 292.

124. This may help account, for example, for the Court's decision in the commercial nude dancing case of Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

125. *See, e.g.*, Justice Tobriner's argument in Crownover v. Musick, 9 Cal. 3d 405, 441, 509 P.2d 497, 521-22, 107 Cal. Rptr. 681, 705-06 (1973) (en banc) (Tobriner, J., dissenting), *overruled*, Morris v. Municipal Court, 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982) (per curiam). Justice Richardson, in turn dissenting in *Morris*, sought unsuccessfully to have the court consider the risk to an already "declining sense of community" posed by overruling *Crownover*. *Id.* at 576, 652 P.2d at 65, 186 Cal. Rptr. at 508 (Richardson, J., dissenting). On societal decline and the loss of community, see *supra* note 91 and accompanying text; and *supra* text accompanying notes 131-79.

126. *See* Justice Richardson's dissent in *Morris*, 32 Cal. 3d at 576, 652 P.2d at 65, 186 Cal. Rptr. at 508 (Richardson, J., dissenting).

127. *See* A. BICKEL, THE MORALITY OF CONSENT 73 (1975). For a statement of the clear and present danger principle in the context of subversive advocacy, see Brandenburg v. Ohio, 395 U.S. 444 (1969).

128. *See* A. BICKEL, *supra* note 127, at 72.

129. *See* A. SOLZHENITSYN, *supra* note 38, at 21.

130. CONDORCET, SELECTED WRITINGS 73 (K. Baker ed. 1976).

individual whose property is always assured finds probity easy . . . ."[131]

Where the balance is initially struck, or the way a constitutional provision is initially interpreted, though, may be subject to change, depending in part on changes in historical circumstances. A theory of long-term societal decline would predict that perceived decline would inspire, among other responses, political efforts at resisting that decline. To the degree that the courts are willing to accommodate political adjustments in the balancing of a suspect's liberty of movement and against a society's real or perceived physical security and sense of community, the courts play a role in the society's general response to perceived decline, even if the courts' reasoning does not explicitly refer to any such considerations.

This is of course one way of viewing the recent Supreme Court case of *United States v. Salerno*.[132] The Court majority in *Salerno* upheld from constitutional attack the Bail Reform Act of 1984.[133] The Bail Reform Act in question permits judges to order pretrial detention of arrestees charged with committing certain serious crimes if, after adversary hearing, the government can show by clear and convincing evidence that no less burdensome combination of pretrial release conditions will suffice to reasonably assure the safety of particular individuals and the public in general.[134]

The Court in *Salerno* rejected the claim that the statute amounted to an attempt to punish suspects based on inevitably crude predictions of future antisocial conduct.[135] In the Court's analysis, predicted dangerousness had not been criminalized by the statute. Rather, the Congress was seeking, if imperfectly, to cope with an "alarming"[136] problem of crimes committed by persons on bail release. The government interest in the balance took the compelling form of "that primary concern of every government—a concern for the safety and indeed lives of its citizens . . . ."[137]

It is of course not the aim of this Article to pass judgment on the merits of *Salerno*. *Salerno* stands as a judicial accommodation of a congressional enactment that may be viewed as a predictable response to perceived societal decline, in which Congress adjusts the weights in the pan of the various interests involved, whether Congress actually conceives of the statute explicitly as a response to "decline" or "decadence" or not. It seems clear that long-term societal decline may evoke, or provoke, political responses of various sorts, even if political decisionmakers do not consciously conceive of the problem as one of reacting in some fashion to decline.

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131. *Id.* at 77.

132. 107 S. Ct. 2095 (1987).

133. In particular, 18 U.S.C. § 3142(e) (Supp. III 1985).

134. *Id.* at §§ (e)-(i).

135. *Salerno*, 107 S. Ct. at 2101. For contrasting views, see the Second Circuit majority in United States v. Salerno, 794 F.2d 64 (2d Cir. 1986), *rev'd*, 107 S. Ct. 2095 (1987); United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986) (opinion of Newman, J.); Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 568 (1986). For discussions of the risks and likelihood of predictive overconfidence, see Zimring & Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481 (1986); Comment, *Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439 (1986), and the widely cited A. VON HIRSCH, DOING JUSTICE 19-25 (1976).

136. *Salerno*, 107 S. Ct. at 2098.

137. *Id.* at 2105.

In the context of the Bail Reform Act, it can be said that even if the nature and pervasiveness of predatory crime has not changed since the drafting of the Constitution, at least our perceptions have, and for the worse. At least as a matter of mythology, "[i]n a Jeffersonian democracy, crime is very adequately controlled by the town constable, who supervises the local drunk, shoplifter, and sneak thief . . . ."[138] From this reassuring historical starting point, though, it has been argued that crime rates have trended upward, if irregularly,[139] to the point where "long-term changes in crime rates exceed anything that can be explained either by rational calculation or the varying proportion of young males in the population."[140] Once other possible social factors in generating this historical increase in predatory criminality are given their say,[141] we are left essentially with a decline in what has been thought of as "Victorian morality" to help account for the otherwise inexplicable.[142]

In the extreme, the perception has developed that "[t]he property I keep in my house is my own by legal right—except that the law is quite unable to protect me from thieves, burglars, and vandals."[143] There is a sense that contemporary criminal jurisprudence has, over the long term, become generally less capable of decisively imposing "punitive" judgments for which the judiciary might feel direct moral responsibility, as in the face to face sentencing of a criminal defendant. The judiciary may feel even less responsibility for the merely indirect, unintended consequences in the form of innocent, but unidentifiable, persons being victimized by felony suspects on bail or by paroled convicted felons.[144] Undue difficulty in imposing rational criminal sanctions has long been thought to be an indicator of democratic societies in decline.[145] Certainly, a rational citizen could examine the available statistics on the median time to parole of convicted felons[146] and conclude that our society has become ambivalent about criminal confinement, at least to the degree that prisoners are released without substantial assurance to the community that they will not likely engage in serious criminal misconduct upon release.

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138. R. ADAMS, *supra* note 1, at 160.

139. *See, e.g.*, L. RADZINOWICZ, THE GROWTH OF CRIME 6-7 (1977), and the detail provided by the annual UNIFORM CRIME REPORTS FOR THE UNITED STATES. *See also* C. SILBERMAN, CRIMINAL JUSTICE, CRIMINAL VIOLENCE 40 (1978) (citing calculations of high probability of serious arrest for recent-born males). *But see generally* K. WRIGHT, THE GREAT AMERICAN CRIME MYTH (1985).

140. J. WILSON, THINKING ABOUT CRIME 12-13 (1975). *See also* E. CURRIE, CONFRONTING CRIME 9 (1985).

141. *See generally* J. WILSON, *supra* note 140.

142. *Id.*; *see generally* Wilson, *supra* note 62.

143. R. ADAMS, *supra* note 1, at 154. Of course, the perception of vulnerability to crime may be objectively not fully warranted. *See generally* Taylor & Hale, *Testing Alternative Models of Fear of Crime*, 77 J. CRIM. L. & CRIMINOLOGY 151 (1987).

144. *See* R. ADAMS, *supra* note 1, at 158-59.

145. *See* PLATO, *supra* note 71, at 327; Skemp, *supra* note 76, at 86; A. SOLZHENITSYN, *supra* note 38, at 21-3.

146. *See, e.g.*, R. GOLDFARB & L. SINGER, AFTER CONVICTION 182 (1973) (referring to statistics indicating median time to parole of first degree robbers to be 45 months and of second degree burglars to be 24 months). Sentences of two to four years of actual time served can be viewed by many young criminals as an investment in criminal education during which period any gang associations, for example, can be preserved or enhanced.

Of course, systematically failing to restrain convicted felons who give no indication of posing a reduced danger of serious harm to the community may be justifiable on a variety of grounds. But there are implications of such a systematic failure that suggest a weakening of the collective will or a loss of collective self-assurance, in ways consistent with a hypothesis of societal decline. It is, or should be, widely appreciated that "[c]rime. . .undermines the social order itself, by destroying the assumptions on which it is based."[147] Beyond some point, the perceived level of violence creates a "sense of social disintegration,"[148] a fraying of the social fabric, and the maintenance of community is impaired.[149]

At some level of awareness, the relevant features of the Bail Reform Act of 1984 constitute a response, ratified by the Supreme Court against constitutional challenge, to conditions that are widely thought of as indicative of long-term societal decline. Of course, this is not to suggest that the Act is likely to have any significant practical effect on crime rates,[150] any more than any of the variety of other anti-crime initiatives undertaken of late.[151] The Act may fail of its essential purpose. If it does, though, there arises a certain irony. As Friedrich Nietzsche once observed in another context, a multiplicity of failed reforms, in this case aimed at crime prevention, can itself "create an overall impression as of decay—and perhaps even decay itself."[152]

Decadence and the Problem of Membership in the Community

Membership in the civic community and the scope of a member's or non-member's obligations toward and rights against the community are not self-defining. At least implicitly, the community must act out answers to the questions of who counts as a member, for what purposes, and to what degree. The most generous sort of answer amounts to a determination that everyone who is conceivably a member, or who wishes to be a member, in fact counts as a member, in all respects, equally. But while the most generous answer may reflect the most generous motives, as well as a recognition of the benefits new members will confer on a society, it may also reflect difficulties in engaging in strategic thinking, casualness toward the concepts of community and sovereignty, or other indicia of long-term societal decline.

As we have seen,[153] Plato observed of the declining democratic society that "the metic [resident alien] is equal with the citizen and the citizen with the metic, and the stranger is quite as good as either."[154] Any distasteful elitist overtones aside, however, our society, of course faces similar issues of status, of inclusion and exclusion, and of the perquisites of membership and non-membership. Among the most dramatic contexts in which such issues

147. C. SILBERMAN, *supra* note 139, at 12.
148. E. CURRIE, *supra* note 140, at 5.
149. *See* J. WILSON, *supra* note 140, at 21.
150. *See* J. CONRAD, THE DANGEROUS AND THE ENDANGERED 83 (1985); Comment, *supra* note 135, at 472-76.
151. *See* E. CURRIE, *supra* note 140, at 7.
152. F. NIETZSCHE, THE WILL TO POWER 40 (W. Kaufmann ed. 1967).
153. *See supra* text accompanying note 75.
154. PLATO, *supra* note 71, at 334.

arise are those involving the asserted rights of undocumented aliens. The most important of such cases is *Plyler v. Doe*,[155] a Supreme Court decision attractive both for its undeniable generosity of spirit and, in certain limited respects, its foresightedness and concern for the future.

Plyler involved an equal protection challenge to a Texas statutory policy denying state funds for public school education of undocumented alien children and authorizing local school districts to deny public school enrollment to such children. The Supreme Court, while declining to view undocumented alien children as members of a "suspect class,"[156] and while refusing to accord to a basic public school education the status of a "fundamental right,"[157] nevertheless struck down the statute as not rationally furthering any substantial and legitimate state goal.[158]

The basic policy logic of the majority in *Plyler* was essentially that the Texas statute imposed

> a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.[159]

The Court went on to recognize a state's hypothetical desire to control the internal effects of an influx of undocumented immigrants, but pronounced that the Texas statute in question was an ineffectual way of responding to a probably nonexistent problem.[160] The Court observed that the predominant motivation for undocumented entry into Texas is presumably geared to employment opportunities, not educational benefits for one's children.[161] As long as mere legal deportability of the children does not ensure immediate actual deportation,[162] the Court concluded, "[i]t is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."[163]

The compassion and, in some respects, foresightedness of the majority opinion in *Plyler* is clear, and is freely granted even by the *Plyler* dissenters.[164] To a degree, though, *Plyler* fails to come to grips with some of the

155. 457 U.S. 202 (1982).
156. *Id.* at 219 n.19.
157. *Id.* at 221, 223.
158. *Id.* at 224, 224 n.21, 230. For a sense of some of the scholarly response to *Plyler, see, e.g.*, Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167 (P. Kurland, G. Casper & D. Hutchinson eds. 1983), as well as the contributions by Professors Perry, Lichtenberg, Gerety, Rosberg, and Hull for a symposium in 44 U. PITT. L. REV. 329 (1983).
159. *Plyler*, 457 U.S. at 223-24.
160. *Id.* at 228.
161. *Id.*
162. *Id.* at 226.
163. *Id.* at 230.
164. *Id.* at 242, 252-53 (Burger, C.J., dissenting).

deepest lurking problems. Its analysis of the legitimate role of the state, for example, seems flawed in certain respects. To adopt for a moment the language of the philosophers, *Plyler's* analysis of the state and its legitimate activities is too purely telelogical, and insufficiently deontological. By this is meant simply that *Plyler* presumes that a state may justify its actions only in terms of the state's pursuit of goals, or interests, or some sort of desirable end to be striven for. A state might seek to justify draining a swamp, for example, in terms of aiming at the "end" of protecting the public health. But teleological explanations do not exhaust the range of explanations a state might give for a particular decision. A state might enact a particular statute not in attempt to achieve good consequences, but because the state, or its citizens, deem it the right thing to do, independent of consequences which may or may not be achieved. One aspect of this latter sort of state activity might include acts of the state that by their very enactment help to define the state, or to establish the state as a particular kind of community, apart from any practical consequences the act may generate. In such cases, the familiar sort of constitutional scrutiny that in some fashion questions whether a given means are well-suited for or will tend to advance a given state goal does not fit.

What concerns us particularly, in our context, is the possibility that judicial insensitivity to the possible legitimacy and importance of a state's self-definitive or community-constitutive acts may bespeak, or promote, a degree of societal decline. This is of course not to suggest that every popular act of community self-definition or identity-building is either well-advised or constitutional. *Plyler*, however, tends to imply that the necessity or importance of such self-definitive acts cannot outweigh or legitimize, in constitutional terms, any substantial bad consequences flowing from such acts.

One way of casting doubt on *Plyler* in this particular respect is by noticing the range and monumental differences among arguably legitimate community self-conceptions. Under *Plyler*, a non-member of the Texas community may, without any prior relationship to the United States community, and without the concurrence or consent of Texas,[165] include himself within the Texas community, and take upon himself some number of the community's benefits and burdens, simply through the illegal acts of entering and physically remaining within the borders of Texas. But this is hardly the only conceivable way of constituting the Texas community. There may be persons geographically closer to San Antonio than are the residents of Austin and who currently receive none of the benefits of being a member of the Texas community, solely because their desire for such benefits has not led them to commit the illegal acts of entering and remaining within the boundaries of Texas. Persons who do not violate federal immigration law

165. For a sense of the contemporary debate on the arguable necessity for mutual consent to citizenship, see P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); Helton, Book Review, 19 N.Y.U. J. INT'L L. & POL. 221 (1986); Martin, *Membership and Consent: Abstract or Organic?*, 11 YALE J. INT'L L. 278 (1985); Neuman, Book Review, 24 SAN DIEGO L. REV. 485 (1987); Schwartz, Book Review, 74 CALIF. L. REV. 2143 (1986). *See also* Schuck & Smith, *Membership and Consent: Actual or Mythic? A Reply to David A. Martin*, 11 YALE J. INT'L L. 545 (1986).

may be no less attuned to American cultural and political values than those who do. Yet the former do not count, while the latter must.

If it is thought to be obvious that those who do not violate federal immigration law cannot count, at all, within the Texas community, it must be noted that it was once widely thought obvious that freed former slaves could not count as members of the American community.[166] In reality, the question of who counts as a member, to what extent, and for what purposes, is one that has provoked disparate answers among the leading contemporary writers. One philosopher has, at the level of the nation-state, characterized a leading issue in the following terms: "Does the right of a nation as it is at present to its territory include the right to forbid or limit immigration, or to deny full citizenship to immigrants and even to the locally born children of immigrants?"[167] In other contexts, we are ordinarily reluctant to severely impair peoples' interests without according them some sort of political "voice" in the decision.

One well-known contemporary answer to the question of who counts, in moral terms or who is entitled to share in the benefits of the community, goes so far as to include those at a distant geographical and cultural remove, and to a remarkable degree:

> we ought to give until we reach the level of marginal utility—that is, the level at which, by giving more, I would cause as much suffering to myself or my dependents as I would relieve by my gift. This would mean, of course that one would reduce oneself to very near the material circumstances of a Bengali refugee.[168]

It has been less dramatically argued that there is in fact no greater moral obligation to relieve the suffering of geographically closer, as opposed to more distant, peoples as long as the likelihood of effectiveness and the differences in costs of relief are properly accounted for.[169]

The range of possible answers to the community-defining question of who counts as a member of the community, and who is entitled to share in the benefits and burdens of community membership, is thus quite broad.[170] Conscientious citizens would consider such questions as of the first order of importance, yet their importance is underemphasized by the excessive teleological approach of *Plyler*, which tends to take issues of community identity for granted and focuses instead on issues of resolving, creating, and avoiding bad consequences of goal-oriented state action.

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166. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

167. J.L. MACKIE, *supra* note 53, at 179.

168. Singer, *Famine, Affluence and Morality*, in PHILOSOPHY, POLITICS AND SOCIETY 33 (P. Laslett & J. Fishkin eds. fifth series 1979). This Article of course passes no judgment as to whether it is really in the long-term interests of others for a person in Singer's position to substantially impoverish himself.

169. *See* J. FISHKIN, THE LIMITS OF OBLIGATION 73 (1982). For a variety of contemporary philosophical perspectives on this subject, see the contributions of Professors Barry, Nielsen, Franck, and Richards in 24 NOMOS: ETHICS, ECONOMICS AND THE LAW 219-302 (J.R. Pennock & J. Chapman eds. 1982).

170. *See generally* Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 306 (1986). It seems clear that the range of plausible answers to the question of who counts as a member of the community, and to what degree, expands particularly as the society reaches a high level of income and wealth. *See* Buchanan, *supra* note 40, at 75.

The *Plyler* Court's insensitivity to issues of community and community definition is even less justifiable once it is appreciated that the Court's own approach is too simple even within its own sphere. Certainly, the young children of undocumented aliens are morally innocent,[171] and the innocent are not generally to be morally condemned. As well, it is implausible that any significant number of persons would violate federal immigration solely to enroll their children in Texas public schools.[172] But the moral innocence of a person does not always mandate exemption from practical burden, as we know particularly from the affirmative action context.[173] And while the entry of undocumented aliens is doubtless ordinarily strongly motivated by employment or wage differentials,[174] logic suggests that as the scope of federal and state rights and benefits of various sorts expands,[175] there will be an increase in the percentage of undocumented immigrants whose presence is attributable as much to the overall available benefit package as to the employment or wage differential component.[176]

The world is thus more complex than the *Plyler* Court recognizes it to be, even on its own terms. The choice faced by the Court in *Plyler* was not essentially between enforcing an arbitrary state statute on the one hand, or striking it down to prevent a moral abomination on the other. This is again not to take issue with the result or judicial motivation in *Plyler*. It is reasonable, however, to imagine that a community in long-term decline tends to

171. *See Plyler*, 457 U.S. at 220.

172. *Id.* at 228, 228 n.24.

173. *See* Fullilove v. Klutznick, 448 U.S. 448, 484-85 (1980) (opinion of Burger, C.J.); A. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 102-20 (1979). *But cf.* UAW v. Lyng, 648 F. Supp. 1234, 1240 (D.D.C. 1986) (denial of foodstamps to striker as impermissibly burdening striker's spouse and children).

174. *See, e.g.*, Bhagwati, *U.S. Immigration Policy: What Next?*, in ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION 111, 118 (S. Pozo ed. 1986).

175. For a recent survey, see Wheeler & Leventhal, *Aliens' Rights to Public Benefits*, 20 CLEARINGHOUSE REV. 913 (1986). For selected recent narrower discussions, see Nickel, *Should Undocumented Aliens Be Entitled to Medical Care?*, 16 HASTINGS CENTER REP. 19 (1986); Note, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CALIF. L. REV. 1715 (1986). As a sampling of the relevant cases in areas other than educational rights, one might turn to cases such as Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705, 717-18, 718 n.12 (9th Cir. 1986) (citing a wide range of cases involving recognition of legal rights of undocumented immigrants, with emphasis on labor rights); Ruiz v. Blum, 549 F. Supp. 871 (S.D.N.Y. 1982) (federal and state funded day care benefits not deniable to otherwise eligible child on grounds that mother cannot show lawfulness of her own presence within the United States); Gates v. Rivers Const. Co., 515 P.2d 1020 (Alaska 1973) (employment contract of worker of undocumented status at time of performance is judicially enforceable); Darces v. Woods, 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984) (en banc) (excluding undocumented siblings from consideration in determining recipient's needs for AFDC purposes violates state constitutional guarantee of equal protection); Dermegerdich v. Rank, 151 Cal. App. 3d 848, 199 Cal. Rptr. 30 (1984) (undocumented alien not under deportation order is eligible for medical assistance benefits under state statute); Intermountain Health Care, Inc. v. Board of Comm'rs, 707 P.2d 1051 (Idaho 1985) (citizen through birth in United States may not be denied county medical assistance benefits on grounds of parents' undocumented status); Antillon v. Department of Employment Sec., 688 P.2d 455 (Utah 1984) (undocumented immigrant entitled to state unemployment benefits where INS knowingly discontinues further deportation proceedings against immigrant); Peterson v. Neme, 222 Va. 477, 281 S.E.2d 869 (1981) (undocumented alien worker entitled to recover loss of wages in ordinary tort negligence action). *But see* Zurmati v. McMahon, 180 Cal. App. 3d 164, 225 Cal. Rptr. 374 (1986) (alien for whom political asylum determination was still pending was not permanently residing in United States under color of law and thus not eligible for AFDC benefits).

176. *See* Chiswick, *The Illegal Alien Policy Dilemma*, in ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION 73, 83 (1986); E. HARWOOD, IN LIBERTY'S SHADOW 17 (1986).

attach less meaning to what we have called the deontological issues of community identity and community self-definition, as Rome in decline[177] and Plato's democracy in decline[178] arguably did. The temptation to follow this course is strong, at least in part because restrictive conceptions of community and community identity seem inseparable from sheer ethnocentrism, prejudice, and a fearful meanspiritedness. But it would be itself symptomatic of societal decline for us to imagine that such intolerable motivations render illegitimate any community concern for its identity[179] that extends beyond merely seeking to prevent a range of bad consequences.

CONCLUSION

This Article has sought to shed some light on what should be thought of as important paradoxes. Societies sometimes go into decline without being somehow forced to do so. Since decline would seem generally undesirable from that society's overall standpoint, why don't the forces of societal renewal and regeneration prove effective? In particular, why doesn't the judicial system, whether it is autonomous or dependent on other social institutions, play an important role in successfully resisting the decline of long-established community values and standards, especially where the courts, however much or little independent social influence they may possess,[180] are sworn to defend particular values and standards embodied in a constitution at some previous time? The suggestions and illustrations discussed above may serve to help explain these important paradoxes.

177. *See supra* note 91 and accompanying text.

178. *See supra* text accompanying notes 75 & 154.

179. For a sense of how political communities can define themselves differently in important, legitimate ways, *see generally* the classic G. ALMOND & S. VERBA, THE CIVIC CULTURE (1965).

180. On the issue of the range and importance of authority that the courts can constructively exert, independent from or in opposition to other, arguably more fundamental social institutions, it is worth recalling Learned Hand's famous dictum that "[a] society so riven that the spirit of moderation is gone, no court can save . . . ." L. HAND, THE SPIRIT OF LIBERTY 164 (I. Dillard ed. 1960).